

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned On Briefs December 9, 2008

IN THE MATTER OF: T.L.N. and M.C.F.

**Direct Appeal from the Juvenile Court for Maury County
No. 71249, 71250 George L. Lovell, Judge**

No. M2008-01151-COA-R3-PT - Filed January 21, 2009

The trial court terminated Mother's parental rights on the grounds of abandonment for failure to provide a suitable home, non-compliance with the permanency plan, and persistence of conditions. We reverse.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Reversed; and
Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which HOLLY M. KIRBY, J., and J. STEVEN STAFFORD, J., joined.

Mark K. Green, Columbia, Tennessee, for the appellant.

Robert E. Cooper, Jr., Attorney General and Reporter, and Amy T. McConnell, Assistant Attorney General, for the appellee, State of Tennessee, Department of Children's Services.

Dinah L. Clark, Guardian Ad Litem.

OPINION

This termination of parental rights case arises from a rather unusual set of circumstances, and the relevant facts are largely undisputed. On January 11, 2007, Mother's husband ("Father"), the father of T.L.N., born July 2006, and M.C.F., born April 2004, the children to whom Mother's rights were terminated, was killed by Mother's father in a domestic altercation. Father was the sole source of the family's income. Mother does not have a high school diploma and, at the time of Father's death, had never been employed. On the same day, Mother was arrested for violating her probation

where she failed to pay restitution arising from a September 2004 felony conviction for several counts of forgery.¹ Mother posted bond and was released.

The family lost their rented home due to Mother's inability to pay rent after Father's death, and Mother and the children moved in with Mother's grandmother. Mother contacted the Department of Children's Services ("DCS") to seek assistance. When Mother arrived at DCS in January 2007, she was asked to relinquish custody of the children to Father's relatives. Mother refused, but agreed to execute a power of attorney in order to avoid the children being taken into State custody. In February 2007, Mother voluntarily entered grief and drug counseling at Discipleship House. Shortly thereafter, Father's relatives returned the children to DCS.

In February 2007, the Juvenile Court for Maury County entered a protective custody order placing the children in DCS custody. Mother waived her right to a preliminary hearing, and an adjudicatory hearing was set for March 19, 2007. Following the March hearing, in June 2007 the trial court entered its order finding the children to be dependent and neglected and continuing temporary DCS custody. The trial court awarded Mother reasonable visitation.

On March 6, 2007, DCS devised its first permanency plans for the children. The permanency plans recited reunification with parent as the permanency goal, and DCS did not petition for child support. Mother was permitted supervised visitation. The plans recited three "desired outcomes": that the children would have a "safe, stable and loving home to grow up in," that Mother would "have an income to support her children," and that Mother would "meet all of her children's needs." In order to achieve these outcomes, the plans required Mother to work on her GED; apply for financial assistance, if necessary; participate in grief counseling after release from rehabilitation; continue to participate in AA; submit to random drug testing. Mother signed the permanency plans, which recited a goal target date of September 6, 2007. The trial court approved the plans on July 9, 2007.

On July 10, 2007, the permanency plans were amended to recite dual goals of reunification and adoption. The goal target date was changed to September 30, 2007. The revised plan included substantially the same "desired outcomes," and included a provision that Mother obtain a crib and bed for the children. The reason indicated by DCS for the revision to the permanency goal was "[d]ue to judge's recommendation of aggressive pursuit of performance to include short term goals and specific tasks with identified achievement dates."

Mother successfully completed her counseling/rehabilitation program at Discipleship House on March 30, 2007. During this time, she maintained visitation with her children. Upon completion of the program, Mother moved to Georgia to live with her Mother as approved by DCS in March. The arrangement was not successful, however, and Mother returned to Tennessee in mid-April 2007.

¹ Mother pled guilty to multiple counts of forgery up to \$1,000 committed in 2003 and 2004. On September 8, 2004, the Criminal/Circuit Court for Maury County sentenced Mother to two years in prison. The sentence was suspended and Mother was released on probation and ordered to pay restitution.

Upon returning to Tennessee, Mother once again resided with her grandmother and gained employment as a waitress at the Sugar Shack in Mt. Pleasant earning \$3.30 per hour, plus tips. In May, she rented a two bedroom apartment at \$135 per week and paid a \$310 security deposit.

In early August 2007, Mother sought to change jobs in order to have a work schedule which would allow her to have weekends off in order to visit with her children. She apparently was fired when her new employer learned of the 2004 felony conviction. As a result, Mother failed to pay restitution as ordered by the court in 2004. Anticipating arrest, Mother disappeared from the beginning of August 2007 until arrested on October 12, 2007, for violation of her probation for failure to pay restitution.

On October 25, 2007, DCS filed a petition to terminate Mother's parental rights. In its petition, DCS alleged, as statutory grounds to terminate, abandonment for failure to visit; abandonment for failure to provide a suitable home; substantial noncompliance with permanency plan; and persistence of conditions. DCS further alleged termination of Mother's parental rights was in the best interests of the children.

Mother was released from jail in March 2008. Mother had no visitation with her children while in jail. Shortly after her release from jail, Mother visited the children at DCS on March 20, 2008, under the supervision of her aunt Tracy Roberson (Ms. Roberson), the children's foster/kinship parent, and under observation of a CASA volunteer. Mother resided with a female friend and in late March/early April 2008, Mother gained employment at the rate of \$7.00 per hour. During this period, Mother also completed an application for low income housing with a sliding scale rent based on income.

The trial court heard DCS's petition to terminate on April 8, 2008. On April 28, 2008, the trial court entered its order terminating Mother's parental rights on the grounds of abandonment for failure to provide a suitable home; failure to substantially comply with the permanency plans; and persistence of conditions leading to removal. The trial court further found that termination was in the best interests of the children. Mother filed a timely notice of appeal to this Court. We reverse.

Issues Presented

Mother presents the following issues, as we reword them, for our review:

- (1) Whether grounds for termination of Mother's parental rights were established by clear and convincing evidence.
- (2) Whether clear and convincing evidence supports the trial court's determination that termination of Mother's parental rights is in the best interests of the children.

Standard of Review

We review the decisions of a trial court sitting without a jury *de novo* upon the record, with a presumption of correctness as to the trial court's findings of fact, unless the evidence preponderates otherwise. *In Re: Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); Tenn. R. App. P. 13(d). No presumption of correctness attaches, however, to a trial court's conclusions on issues of law. *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000); Tenn. R. App. P. 13(d).

Tennessee Code Annotated section 36-1-113 governs the termination of parental rights. The Code provides, in pertinent part:

- (c) Termination of parental or guardianship rights must be based upon:
 - (1) A finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and
 - (2) That termination of the parent's or guardian's rights is in the best interests of the child.

Tenn. Code Ann. § 36-1-113(c)(2005).

Thus, every termination case requires the court to determine whether the parent whose rights are at issue has chosen a course of action, or inaction, as the case may be, that constitutes one of the statutory grounds for termination. *In Re: Adoption of a male child, W.D.M.*, No. M2002-02963-COA-R3-CV, 2003 WL 22794524, at *3 (Tenn. Ct. App. Nov. 25, 2003); *see generally* Tenn. Code Ann. § 36-1-113(g)(1)-(9)(2005). The State may not deprive a parent of their fundamental right to the custody and control of their child unless clear and convincing evidence supports a finding that a statutory ground for termination exists and that termination is in the best interests of the child. Tenn. Code Ann. § 36-1-113(c)(2005). Although the "clear and convincing evidence" standard is more exacting than the "preponderance of the evidence" standard, it does not require the certainty demanded by the "beyond a reasonable doubt" standard. *In Re: M.L.D.*, 182 S.W.3d 890, 894 (Tenn. Ct. App. 2005). Clear and convincing evidence is evidence that eliminates any substantial doubt and that produces in the fact-finder's mind a firm conviction as to the truth. *Id.* Insofar as the trial court's determinations are based on its assessment of witness credibility, this Court will not reevaluate that assessment absent evidence of clear and convincing evidence to the contrary. *Id.*

The heightened burden of proof in parental termination cases requires us to distinguish between the trial court's findings with respect to specific facts and the "combined weight of these facts." *In Re: M.J.B.*, 140 S.W.3d 643, 654 n.35 (citations omitted). Although we presume the trial court's specific findings of fact to be correct if they are supported by a preponderance of the evidence, "we are the ones who must then determine whether the combined weight of these facts provides clear and convincing evidence supporting the trial court's ultimate factual conclusion." *Id.* With this standard of review in mind, we turn to whether the trial court's conclusions in this case are supported by clear and convincing evidence.

Analysis

We begin our analysis with two observations. First, as Mother concedes in her brief, she has not been a model parent. DCS first became involved with this family in July 2004, when Mother was arrested for theft and fraud and Father was incarcerated. Further, as Mother testified at the April 2008 trial of this matter, her decision to disappear in order to avoid arrest for failure to pay court-ordered restitution following Father's death was "immature" at best. We neither condone nor excuse Mother's attempts to hide in August and September 2007. Second, we note that although the trial court terminated Mother's parental rights on three separate grounds, the three grounds substantially arise from the same four factors: 1) the failure of Mother to provide a suitable home; 2) Mother's failure to provide DCS with a letter indicating Discipleship House's recommendation for grief counseling; 3) Mother's failure to complete in-home drug counseling; and 4) Mother's failure to secure her GED.

There is no dispute in this case that, when DCS filed its petition to terminate Mother's parental rights in October 2007, the children had not been in Mother's custody since February 2007. However, the record demonstrates that from the time she was released from Discipleship House at the end of March 2007 until the end of July 2007, Mother made substantial efforts to work toward providing a suitable home for her children. Mother, who is uneducated and inexperienced, undisputedly worked long hours making approximately \$3.00 per hour as a waitress. At the April 2008 hearing of this matter, DCS representative Jamie Smith (Ms. Smith) testified that, following completion of the Discipleship House program, Mother had maintained employment and had secured a home through the end of July 2007. Mother's home was not considered suitable, however, because Mother did not have a crib or toddler bed. By the time DCS secured a crib in August 2007, Mother had borrowed one from a friend.

It is undisputed that Mother secured a home independently, and that she paid her deposit and rent and secured furniture, other than the proposed crib, without DCS assistance, and that she provided the children's clothes, food, diapers, formula and toys when they were with her. Although Ms. Smith testified that DCS "tried to assist her with paying her rent" but that Mother "either . . . did not accept the services or we could not locate her," Mother testified that the offer was not made after she left Discipleship House and that she was simply unaware that funds were available for transportation and other services. Mother testified that she originally went to DCS in early 2007 to seek assistance with rent, and that "[t]he only time [she] ever asked for help, they took [her] children away from [her]." This testimony is supported by the guardian ad litem's statements at the April 2008 hearing. Ms. Roberson, who has fostered the children, is willing to continue to care for them, and who also is willing to adopt the children, testified that Mother had received no financial assistance and that she was present when Mother was counting out \$1 bills to pay for her rent in the summer of 2007. As noted above, when this matter was heard shortly after Mother's release from jail, Mother had secured employment at the rate of \$7.00 per hour and had applied for low-income housing. Within a few days after leaving jail, she had arranged for supervised visitation with her children at DCS.

Additionally, Mother undisputedly has passed every drug screening since January 2007. We note, moreover, that Mother was required to submit to a drug screening before every visitation with her children, Mother did so consistently, and that Mother attempted to visit with her children regularly for weekends through the end of July 2007. Further, at the April 2008 hearing, Andrew Buckner, a counselor with Overcoming Services, a State drug assessment contractor, testified that Mother had submitted to an in-home drug assessment, the results of which were written on July 31, 2007. Mr. Buckner further testified that he attempted to contact Mother in August to inform her that the assessment indicated a high probability of drug dependency, but was unable to reach her. Mr. Buckner also testified that he knew Mother's random drug screens had been negative since January 2007. Thus, Mother submitted to the required drug assessment but, due to her disappearance and subsequent incarceration, was not aware the in-home counseling had been recommended. Mother testified at the April hearing, however, that she was willing to do in-home counseling and "whatever it took" to regain custody of her children. There is nothing in the record to indicate the significance of the required letter from Discipleship House regarding grief counseling, moreover, other than with respect to the likelihood that Mother would return to drug abuse. As the guardian ad litem stated at the hearing of this matter, this requirement seems irrelevant in light of the fact that Mother has been drug and alcohol free since January 2007.² Although we agree with DCS that Mother and her children would benefit from Mother receiving her GED, in light of the time lines in this case, we cannot fathom how Mother would have received her GED by September 30, 2007, as targeted by DCS.

Clearly, things "fell apart" in August 2007, and Mother made no attempt to secure employment or provide a home for her children after she became convinced she would be incarcerated for violation of her probation. However, the record simply does not reflect a wonton disregard for the welfare of her children on Mother's part. We note that Mother testified that, although she did not pay child support, she was not ordered to pay child support and the permanency plans indicate that no child support was sought by DCS. Mother further testified that she had filed for SSI benefits for the children, and that DCS received SSI benefits in the amount of \$100 per month per child. There is neither evidence nor allegation of physical or emotional abuse in this case. Further, DCS's allegation of abandonment for failure to visit for four months preceding the filing of the petition to terminate parental rights is not supported by any evidence in the record. Although Mother undisputedly did not have visitation with her children while she was incarcerated, there is nothing in the record to indicate that DCS made any effort to facilitate visitation or contact. Mother testified, however, that she had some telephone contact with the children from jail, and that she was told that DCS would not allow the children to come to the jail. Mother also testified that she did not believe it would have been a "good idea" to bring the children into the jail. Further, upon review of the entire record, we agree with the guardian ad litem that DCS did not make reasonable efforts in this case to assist Mother to establish a suitable home and to reunify Mother and the children.

² We note that Mother voluntarily told DCS that she had taken what she thought was a Lortab for a headache, and that she received the medication from a friend and without a prescription.

In making its determination of grounds, the court must conclude that DCS has made reasonable efforts to return the children to the parent's care and custody, or that, under the circumstances, such efforts would have been futile. *E.g., In Re: Q. E., D. E. and N. H.*, No. W2008-00634-COA-R3-PT, 2008 WL 5397540, at *9 (Tenn. Ct. App. Dec. 23, 2008)(citations omitted). DCS is obligated to make reasonable efforts both before and after a child is removed from the parent's home. *Id.* First, DCS "has a duty to use reasonable efforts to avoid removal." *Id.* (citing see Tenn. Code Ann. § 37-1-166(a)(1), (g)(2)(A) (2005)). Second, after removal, DCS "must use reasonable efforts to reunify the parent with the child." *Id.* (citing see T.C.A. § 37-1-166(a)(2), (g)(2)(B)(2005)). Reasonable efforts is "the exercise of reasonable care and diligence by the department to provide services related to meeting the needs of the child and the family." Tenn. Code. Ann. § 37-1-166(g)(1)(2005).

Reasonable efforts entail more than simply providing parents with a list of service providers and sending them on their way. The Department's employees must use their superior insight and training to assist parents with the problems the Department has identified in the permanency plan, whether the parents ask for assistance or not.

In Re: C.M.M., No. M2003-01122-COA-R3-PT, 2004 WL 438326, at *7 (Tenn. Ct. App. Mar. 9, 2004)(citations omitted). The Department is not required to make "Herculean" efforts, however, and "the remedial responsibility does not rest solely on the Department's shoulders." Parents also are required to "make reasonable efforts to rehabilitate themselves and to remedy the conditions that required them to be separated from their children." *Id.* The burden is on the State to prove by clear and convincing evidence that its efforts at reunification were reasonable under all of the circumstances. *Id.* at *8.

Whether DCS has made reasonable efforts to reunify the family must be decided on a case-by-case basis. The court must consider

(1) the reasons for separating the parent from his or her child or children, (2) the parent's physical and mental abilities, (3) the resources available to the parent, (4) the parent's efforts to remedy the conditions that required the separation, (5) the resources available to the Department, (6) the duration of the parent's remedial efforts, and (7) the closeness of the fit between the conditions that led to the initial separation, the requirements in the permanency plan, and the Department's efforts.

Id. at *7. "Efforts directed toward matters of little consequence are not reasonable." *Id.* at *7 n.25 (citing *In re Valentine*, 79 S.W.3d at 548-49 (a permanency plan must be reasonable and must be related to remedying the conditions that led to the removal in the first place)).

Upon review of the record, we agree with the guardian ad litem's assessment of DCS involvement in this case. As the guardian ad litem noted, this is not a case of child abuse or abandonment for failure to visit. The record reflects consistent efforts by Mother to visit with her children from January 2007 through the beginning of August 2007. We note, moreover, that Mother

was required to pass a drug screen before every visit, that visitation was for entire weekend periods, and that Mother was not permitted to visit for partial weekends. Further, the record reflects that DCS did little to promote Mother's visitation with her children. Additionally, it appears that DCS did very little, or virtually nothing at all, to assist Mother in finding employment. When questioned at the April 2008 hearing, Ms. Smith stated that she "believe[d] [she] gave [Mother] the number to a person at the Career Center who assists mothers with children in DCS to get jobs." Other than providing Mother with this telephone number, DCS apparently did nothing to assist Mother to secure employment. DCS did not assist Mother in locating housing, and apparently made no effort to offer Mother transportation or financial assistance other than one offer to pay one month's rent.

Clearly, the children were removed from Mother's care because she was unemployed and homeless following the killing of Father by Mother's father. The children remained in DCS custody while Mother voluntarily underwent grief and drug rehabilitation. Following completion of the rehabilitation program, Mother gained employment and housing and was fulfilling the requirements of the permanency plan, including obtaining a crib, without much substantive assistance from DCS. Mother unwisely attempted to disappear when she lost a new job when her employer discovered she had been convicted of a felony, a job which she took in order to have weekends for visitation with her children. She was incarcerated for five months for the failure to make restitution payments arising from her 2004 conviction. She had no prior criminal record. Upon release from jail, she re-established visitation with her children almost immediately, and within a month had secured employment. Mother has testified that she is willing to undergo in-home drug counseling, a requirement which she was unaware of as a result of her disappearance in August.

Undisputedly, Mother largely was "back at square one" when this matter was heard in April 2008. That is, she was without a home of her own and penniless. However, significantly, she has remained drug and alcohol free. She entered rehabilitation voluntarily and without DCS assistance. She is employed. She has applied for low-income housing. She has not been involved in criminal activity since early 2004. Moreover, in our view, DCS made very little effort to provide Mother the assistance and services she would have needed to complete the requirements of the permanency plan by the goal target date.

We are not insensitive to the trial judge's desire to provide these children with a safe and stable environment. However, Ms. Roberson testified that she will continue to care for the children and to work with DCS. The "combined weight" of the facts contained in the record support the guardian ad litem's statement at the April 2008 hearing that "this was filed too soon." Having reviewed the record in its entirety, we agree with the guardian ad litem, moreover, that DCS did not "take[] [Mother] under their wing [] as they should have." We further agree with both the guardian ad litem and Ms. Roberson that Mother had made significant progress prior to her re-incarceration for failure to pay restitution. Further, as the guardian ad litem noted, had DCS offered financial assistance in the summer of 2007, many of Mother's difficulties likely would have been avoided. We also note that the undisputed requirement that Mother have visitation with her children for entire weekends or, as Ms. Roberson testified, not at all, severely hampered Mother with respect to both visitation and employment. Finally, although Mother continues to have considerable debt to repay

by way of court-ordered restitution, Mother's testimony that her probation officer has assured her that she will not be re-incarcerated for failure to pay restitution as long as she makes good faith payments has not been disputed.

In light of the foregoing, we hold that DCS has failed to carry its burden to demonstrate that it made reasonable efforts to assist Mother to achieve the target goals identified in the permanency plans and to be reunited with her children. We accordingly reverse the trial court's judgment terminating Mother's parental rights. In so doing, we emphasize that Mother does not have unlimited time or opportunity to fulfill the requirements necessary to regain custody of her children. She must remain employed; she must establish a suitable, stable home; she must remain drug and alcohol free, undergo in-home drug counseling, and participate in AA; she must continue to pay court-ordered restitution; she must work towards obtaining her GED; and she must visit and care for her children appropriately.

Holding

The judgment of the trial court terminating Mother's parental rights to T.L.N. and M.C.F. is reversed. Costs of this appeal are taxed to the State of Tennessee, Department of Children's Services.

DAVID R. FARMER, JUDGE